No. 505.

Mot. of Britton & Browne for Leave

Filed Nov. 9, 1897.

FILED
NOV 9 1897
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JAMES P. MERRITT ET AL., APPELLANTS,
v.
PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL.

No. 505

Appeal from the United States Circuit Court for the Northern District of California.

Now come the appellants, by their counsel, and respectfully move this honorable Court for leave to use on the present appeal the transcript of record now on the files of this Court, and on which this cause was docketed at the October term, 1896, supplemented by the additional matter relating to the present appeal.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellants.

STATEMENT.

This cause was docketed in this Court at the last term as No. 798 thereof, and the appeal was, on motion, dismissed on May 24, 1897. The Circuit Court has since allowed a second appeal, and bond has been duly given thereunder.

The transcript of the record as filed on the original appeal embraces more than three thousand pages and, counsel are informed, cost the appellants some $1,800 in its preparation. It is respectfully submitted that the use of this original transcript on this second appeal would obviate the useless expenditure of so large an amount of money in the mere duplication of the same transcript of record now upon the files of the Court. No one can possibly be prejudiced thereby, and the order desired would, in our understanding, be in entire harmony with the practice with respect to allowed petitions for certiorari, wherein the certified transcript submitted upon such petition is permitted to be used in the docketing of the cause on return to such writ. We also beg to suggest that this Court at the October term, 1895, on the motion of the undersigned, having dismissed the case of Rouse, Receiver, *v.* Hornsby, No. 706 of that term, on May 4, 1896, permitted counsel to present a petition for certiorari therein, and to use the transcript in No. 706, on submission of such petition.

Notice of this motion was duly served upon counsel for appellees on October 21, 1897, as appears by the proof thereof filed with the clerk.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Appellants.

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No. 505.

Affidavit for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Nov. 9, 1897.

No. 505

JAMES P. MERRITT ET AL., APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE ET AL.

Affidavit of George N. Williams in Opposition to Motion Respecting the Record on Appeal.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

George N. Williams, being duly sworn, deposes and says that he is and at all the times herein mentioned has been the solicitor for the complainants in the above-entitled cause; that said cause was pending in the circuit court of the United States for the ninth circuit and northern district of California for several years; that during said time there was much litigation over the question whether the said circuit court had jurisdiction of the cause; that upon said question much evidence was taken, said evidence being mainly to the point whether the complainants had not engaged in a collusive

attempt to impose on the jurisdiction of the court; that said evidence is now on file and a part of the record in the cause; that the said circuit court found that there was no such collusion and sustained the jurisdiction of the court; that the jurisdiction of the court was also attacked upon the ground that John A. Stanly and Stephen W. Purington, defendants to the original bill, were citizens of the State of California and were improperly joined as defendants for the purpose of conferring jurisdiction upon the court, and that their interest was generally with the plaintiffs, and that they should be arraigned and considered as plaintiffs for the purpose of determining the question of jurisdiction; and if they should be so arraigned there would be citizens of the State of California on each side of the cause; that the said circuit court held against said contention and sustained its jurisdiction; that thereafter a long hearing was had upon the merits of the cause, and that much evidence was taken upon said hearing, which evidence is now on file and a part of the record in the cause; that upon such hearing said court made and entered its final decree in favor of the complainants and against the defendants.

And this affiant further deposes and says that long after the term at which said final decree was made, entered, and enrolled the defendants James P. Merritt and Harry P. Merritt took an appeal to this honorable court; *that said appeal was solely upon the question whether the said circuit court had jurisdiction over said cause*, as will more fully appear from the assignments of error on said appeal, to which reference is hereby made; that long after the expiration of said term at which said final decree was made, entered, and enrolled the said appellants, James P. Merritt and Harry P. Merritt, obtained a certificate of jurisdiction from the Honorable Joseph McKenna, then judge of said court; that thereafter the complainants made a motion to dismiss said appeal upon the ground that no certificate of jurisdiction was obtained during the term at which the judgment was rendered; that the

record and moving papers upon said motion are now upon file in this honorable Court, and the complainants crave leave to refer to them and make them a part hereof; that said motion was duly submitted on the 10th day of May, 1897, and that on the 24th day of May, 1897, this honorable Court dismissed said appeal for want of jurisdiction, to which dismissal affiant respectfully refers.

That thereafter the said appellants, James P. Merritt and Harry P. Merritt, applied to said circuit court for an order allowing a second appeal; that said circuit court, against the objection and protest of the complainants, made an order allowing said second appeal; that said second appeal was allowed *upon the ground that a constitutional question was involved in said case;* that *the hearing of the application for the allowance of said second appeal was the first time that it was ever urged or contended in said cause that any constitutional question was involved, and that the only ground upon which it was attempted to be supported was in substance and effect that inasmuch as the jurisdiction of the court depended ultimately upon the provisions of the Constitution of the United States, therefore a constitutional question was involved*—in other words, so far as affiant understands the argument made upon said occasion, every question of Federal jurisdiction necessarily involves a constitutional question, and in this regard affiant respectfully refers to the petition and assignments of error of said James P. Merritt and Henry P. Merritt upon said second appeal and craves that they be considered upon the hearing of this motion.

And affiant further deposes and says that the papers referred to in the notice of motion upon which this affidavit is filed, to wit, the notice of motion on behalf of said James P. Merritt and Harry P. Merritt, dated October 21, 1897, and noticed for Monday, the 8th day of November, 1897, *have not been served upon affiant as solicitor for complainants or upon any of the counsel for complainants;* that the portion of the transcript of the record on file in the clerk's office of

said supreme court on said first appeal was not served with said notice of motion or upon affiant as solicitor, as aforesaid, or upon any of the complainants' counsel, and that no copy of the transcript of the additional record mentioned in said notice of motion has ever been served upon affiant or upon any of the counsel for the complainants in said cause.

And this affiant further deposes and says upon information and belief that the certified transcript of the portion of the record in said cause filed by the said appellants with the clerk of this Court as the record of the first appeal to said suit in said supreme court is, in the opinion of this affiant, *utterly and entirely insufficient as a record on said second appeal in said cause;* that, in the first place, the ground upon which said appeal was allowed, and the only ground upon which it can be pretended that this Court has jurisdiction, is *that a constitutional question is involved upon said appeal,* and that, *as affiant is informed and believes, such an appeal, if valid, takes up the whole case to this honorable Court,* and that consequently it is necessary that the whole record should be before this Court on said appeal; and affiant further deposes and says upon his information and belief that the portion of the record filed on said former appeal and referred to in said notice of motion is not even sufficient to present the question of jurisdiction of the said circuit court over said cause.

And affiant further deposes and says upon his information and belief that the additional record referred to in said notice of motion consists merely of the papers upon the application for allowance of said second appeal, and that neither of said portions of the record referred to in said notice of motion nor both together are sufficient to properly present to this Court either the said question of jurisdiction or the questions arising upon said second appeal, if the same shall be considered to be properly taken.

And affiant respectfully protests and objects to the granting of said motion or to the substitution of any partial or in-

complete record upon the appeal in said cause, but requests that this Court require the record provided by law to be produced before it; and affiant is authorized to state that all of the counsel for complainants join with him in this protest, objection, and request.

And affiant respectfully states to this Court that in his opinion and in the opinion of all of the counsel for the complainants in said cause the said second appeal is nothing more than an attempt on the part of the said appellants to obtain what is practically a rehearing of the question disposed of by this honorable Court in its order dismissing said first appeal; and affiant humbly prays that if this Court shall consider that such is the case it will deal with the appeal of said appellants as justice shall seem to require.

GEO. N. WILLIAMS.

Subscribed and sworn to before me this 1st day of November, 1897.

[SEAL.] A. J. HENRY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] United States Supreme Court. The President and Trustees of Bowdoin College *et al.*, appellees, *vs.* James P. Merritt *et als.*, appellants. Affidavit of George N. Williams in opposition to motion respecting the record on appeal.